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IN THE

Supreme Court of the United States

October Term, 1947.
No. 213

E. J. STANTON & SON,

Plaintiff and Respondent,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Defendants and Appellants.

BRIEF OF DEFENDANTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A.
Statement of Facts.

The petition for certiorari herein seeks review of a judgment of the District Court of Appeal of the State of California. The judgment became final with the denial of hearing by the State Supreme Court, May 17, 1947.

The opinion by the District Court of Appeal sets forth the following:

> "Respondent has been for fifty years engaged in the wholesale and retail lumber business in Los Angeles County. One of its activities has been the importation of hardwoods from Central and South American republics, Australia, the Philippines, and

other Oriental lands. Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill; lumber of different shipments was kept separate. After being so placed in the storage yard the lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the 'broken lots' remaining after sales had been made from a cargo were taxed. Some of these remained on respondent's premises at the harbor, while others were transported to its yard at Vernon where it was 'detailed to various bins' in which it was stored after being tallied and sorted. By the method long in use by respondent each shipment is placed in a separate bin where it is segregated for color and thickness. All lumber is measured by board feet except lignum vitae which is measured by weight. It is stacked with laths between the layers of lumber to preserve it from fungus and rot and not to process it. It is not kiln-dried prior to sale. The taxed lumber, says respondent, consisted of 'portions of shipments remaining after sales by plaintiff of portions of the original shipment . . . all lumber was kept in piles where only lumber from one shipper was present . . . The bin depleted

by sales is filled by the addition of more of the same type of lumber from the same importer . . . Lumber is sold from these bins by a carload, a truck load or several carloads. The number of sales from any particular bin varies from a few to a single sale.'" [Tr. of Rec. pp. 43-44.]

B.
Position of Defendants.

The petition for certiorari should be denied for the reasons (1) that the petition is based on assumptions of fact not supported by but contrary to the findings of the trial court and to the recitals of the District Court of Appeal, and the writ will not lie to review disputed questions of fact; (2) that petitioner's conduct as to handling and the sale of substantial portions of the lumber had the legal effect of incorporating it into the mass of taxable property in the country; and (3) That no debatable constitutional question is involved.

I.
Certiorari Does Not Lie to Review a Disputed Question of Fact.

The petition represents that "no question as to the facts is raised." (Pet. p. 4.) On the contrary, several questions of fact are raised and asserted by the petition contrary to the record. Petition asserts, for example, in its opening statement:

> "Your petitioner is and for upward of forty years last past has been a corporation organized under the laws of California with its principal place of business as an importer and wholesale of lumber in the County of Los Angeles" (*ib.* p. 1).

Beyond this limited representation, petitioner has been and is retailer as well as wholesaler. The findings of fact by the trial court were "that plaintiff is now and for many years last past has been engaged in the general lumber business and, among other things, in the importing of lumber and the sale of such lumber." [Tr. of Rec. p. 31, fol. 39; p. 1, fol. 1.] The District Court so declared on the evidence. [Tr. of Rec. p. 43, fol. 66.] Such too was the earlier representation by petitioner, in its brief to the District Court, where we read "Plaintiff is a corporation and it and its predecessors have engaged in the wholesale and retail lumber business in Los Angeles for upwards of fifty years." (Resp. Br. p. 3.)

The petition recites with respect to the imported lumber that "each piece continued to bear its original import mark of identification and was in the original form as imported. . . ." (Pet. p. 4.) No evidence was introduced and nothing in the record indicates that the marks on the lumber continued or were preserved on the lumber after delivery and after the marks had fully served their purpose. The opinion quotes petitioner as to what that purpose was:

> "Such marks merely identified the producer, who varies them for different shipments. They are put upon the boards to enable the carrier to unload the shipment without mixing the cargoes going to different importers." [Tr. of Rec. p. 48, fol. 75.]

The petition misapprehends the basis of the decision by the District Court. It represents such decision to have turned on a single point because of its statement that "The controversy revolves about the question whether upon the sale of a portion of a shipment, the remainder becomes

subject to taxation." This, the petition quotes and then continues:

> "It was the opinion of the District Court that by virtue of such sale the whole unsold shipment remaining in the hands of the importer unchanged in form becomes subject to taxation." (Pet. p. 5.)

This constitutes essential misreading of the decision. It is true that the Court did make the quoted statement. [Tr. of Rec. p. 44, fol. 68.] The decision of the District Court, however, was that the imported lumber was incorported into the mass of taxable property in the country as a result of the conduct of the importer and his treatment of the lumber in two regards: (1) in the grading, piling, separating as to size or color and classifying as to first, second, select and common grades and sorting to make more available for sale, and (2) selling portions thereof. Such two-phase conduct had the effect of discontinuing the import character and constituted the lumber part of the mass of taxable property in the country. The point involved was not merely as to the broad question which "the controversy revolves about", but the narrow question whether petitioner as importer had not so treated the lumber as to incorporate it into the mass of property in the country. The mere fact of sales having been made was not the sole basis of the decision. The two phases were urged by the county and were present, as the opinion indicates when it says:

> "Appellants argue that (1) by the sorting, segregating and tallying of the timbers, and (2) by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation. As

proof of the incorporation of the remnants of shipments into the mass of the county's property it was developed that it might be a number of years before a particular cargo is entirely sold out, and if a few odd pieces are left in a bin a new shipment of the same type from the same producer is put into the same bin." [Tr. of Rec. p. 44, line 68.] (Our numbering.)

The opinion was based on the two aspects of the importer's treatment of the property. Stressing the first phase, the District Court said:

"Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the [fol. 67] lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. Only the 'broken lots' remaining after sales had been made from a cargo were taxed." [Tr. of Rec. p. 43.]

"The conduct of respondent in the grading of the lumber, in piling and separating it with respect to

thickness at the [fol. 76] yards, in keeping the light from the dark, in classifying it as first, seconds, select number 1 and common, and in passing it through two or more sorting operations 'making it readily available for sale' before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

"Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitutional inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer 'otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common [fol. 77] mass, and the law may treat them as it finds them.' . . ." [Tr. of Rec. pp. 48-49.]

The petition misconceives the questions presented, or at least inaccurately and confusedly indicates them in its summary of "Questions Presented." (Pet. p. 6. Petitioner confusedly states the character of the property involved and the items thereof, and erroneously asserts

wrapping and enclosure thereof, all contrary to the facts. The petition represents as the first of the questions presented that

> "(1) a bulk shipment of lumber, (oil, paper, fertilizer, or cattle in regular course of trade) is imported from foreign lands. It is composed of individual pieces, (boxes, barrels, packages or animals) according to ordinary mercantile practices. (The articles comprising said shipment are identified, carried and passed by customs as individual items . . .)" (Enclosing parentheses supplied to indicate erroneous matter.)

Our criticisms of such statement of the question involved are several. The statement misstates the subject matter: the property involved was of course only lumber and not as well any of the other properties mentioned. The lumber was composed, as stated, of individual pieces but not as well of "boxes, barrels, packages or animals." Also, the lumber was not "identified, carried or passed" by the United States Customs by the individual item or by the board or piece. Instead as the opinion of the District Court truly recites:

> "The circumstances attending the shipments in question are additional reasons for concluding that the several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) The United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and

the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." [Tr. of Rec. p. 48.]

The petition represents as the second of the "Questions Presented" the question, ". . . does the sale of any one or more of the articles of import, comprised in the total shipment, subject the other articles therein, during the time when they are held in warehouse in their original state of importation by the original owners, to state taxation?" (Pet. p. 6.) Such asserted aspect of "sale of any one or more of the articles" is not according to the facts. Instead the facts are of many sales and mere depleted remnants of imports being left and the taxation then of such remnants or "broken lots." Such "broken lots" also were not held in a "warehouse," but in the petitioner's lumber yards and there offered for sale and sold.

The third of the purported "Questions Presented" which the petition sets forth assumes that petitioner indulged in only such handling of the imported lumber ". . . as is solely essential to the preservation or completion of the mercantile transaction." If by that the petition means the "transaction" of importation, it is clearly in error. The grading, piling, separating as to size, classification, etc., as above indicated were made, not in order to "preserve and complete" the importation but to render the lumber more saleable.

The fourth of the purported "Questions Presented" represents as the fact mere *attempt* to sell *part* and asks ". . . does the mere offering for sale of any one or more

of the articles of lumber . . ." subject the unsold stocks to state taxation? The fact instead, of course, was that petitioner offered *all* for sale, and actually sold the major portion of the imports. The sales may be so many and so large and the depletion may be so extensive as quite to exhaust the entire import. In which case, as the District Court notices, "if a few odd pieces are left in a bin a new shipment . . ." is added. [Tr. of Rec. p. 44.]

The petition represents that the foregoing alleged questions ". . . were duly raised and argued by your petitioners and appellees in said District Court of Appeal." (Pet. p. 6.) To the contrary, those were not the questions stated or raised or argued or determined in the District Court.

On certiorari this High Court will not review the weight of the evidence before the state court. (*Whitney v. People of the State of California,* 274 U. S. 357, 367, 71 L. Ed. 1095, 1102.) The rule is that the decision of the state court upon a question of fact cannot be made the subject of inquiry before this Court. (*Grayson v. Harris,* 267 U. S. 352, 359, 69 L. Ed. 652, 656; *Dower v. Richards,* 151 U. S. 658, 668, 38 L. Ed. 305, 309; *Ward & Gow v. Krinsky,* 259 U. S. 502, 511, 66 L. Ed. 1033, 1036; *Baltimore and Ohio S. W. R. R. Co. v. Burtch,* 263 U. S. 540, 543, 68 L. Ed. 433, 436; *Telluride Power Transmission Co. v. Rio Grande W. R. Co.,* 175 U. S. 639, 645, 44 L. Ed. 305, 308; *Carpenter v. Williams,* 9 Wall. 785, 786, 19 L. Ed. 827, 828, 11 C. J. 204.)

II.

Petitioner's Method of Handling the Imported Lumber, Together With Sale of Substantial Portions Thereof, Terminated Any Tax Immunity and Incorporated the Entire Property Into the Mass of Taxable Property in the County.

After the lumber reached this country, petitioner lumber company classified and graded it according to kind, quantity and condition and assembled and stacked it for more ready sale. Thereafter petitioner made sales from such stacks at wholesale and retail and in quantities varying from a few feet to carload lots. The broken lots thereafter remaining were reassembled and restacked, and further sales therefrom then made. Answer to the constitutional question herein as to the taxability of the imported lumber as between petitioner lumber company and the County of Los Angeles and the City of Los Angeles depends upon such handling of the property by the lumber company and the legal results flowing therefrom. The question is whether, after such handling of the property and such conduct by its owner, the property is still in the original form or package and still entitled to immunity from taxation. The District Court notices the decision in *Brown v. Maryland,* 12 Wheat. 419, 6 L. Ed. 676, and the language of Chief Justice Marshall declaring tax immunity for an import "while remaining the property of the importer while in his warehouse in the original form or package in which it was imported." And the District Court says that "The meaning of his phrase 'original form or package' is determinative of the instant contest. While respondent says each board is a separate package and is in its original form, appellants contend that the 'package'

of lumber is the bulk transported in the ship's hold." [Tr. of Rec. p. 45, fol. 70.]

Petitioner's handling of its import lumber and the resulting incorporation of the lumber into the mass of taxable property in the county are thus stated in the opinion of the District Court:

> "Its method of handling the shipments of such lumber brought on the situation which induced the assessor to tax the lumber remaining in the stocks after being depleted by sales therefrom. As a shipment was unloaded by crane at the Inner Harbor Terminal Dock at Los Angeles Harbor the lumber was transported by Ross carrier to respondent's storage yard near the dock. There the pieces were segregated and stacked according to thickness, color, grade and type from the same mill. Lumber of different shipments was kept separate. After being so placed in the storage yard the [fol. 67] lumber was tallied by counting the various stacks to ascertain the dimensions and 'board measure of the different lumber.' No change whatsoever was made in any piece in these stacks after receipt of it and prior to sale. From time to time sales were made from the stacks in the yard, prior to the tax dates, while at the same time no taxes were ever levied upon intact cargoes. *Only the 'broken lots' remaining after sales had been made from a cargo were taxed.*" [Tr. of Rec. p. 43, fols. 66-67.]

The declaration of the District Court as to the legal effect resulting from such conduct is thus stated in the District Court opinion:

> "The conduct of respondent in the grading of the lumber, in piling and separating it with respect to thickness at the [fol. 76] yards, in keeping the li[illegible]

from the dark, in classifying it as first, seconds, select number 1 and common, and in passing it through two or more sorting operations 'making it readily available for sale' before storing it in the bins from which it is to be sold, argues that the lumber involved in these actions had been placed in the common mass of property in Los Angeles county prior to the assessment dates in each instance and that the collection of taxes thereon did not constitute a violation of the constitutional restraint. This conclusion is emphasized by the further act of the importer in mixing the remnants of a bin remaining after sales therefrom with a new cargo of the same variety for the purpose of facilitating future sales.

"Respondent endeavors to show a similarity of Brown v. Maryland to the case at bar. While there is no parallel, the Chief Justice, in disposing of Maryland's objection that the constitution inhibition might be construed to cover sale piecemeal, announced that there is no restraint against local taxation on the import the moment such sale begins. If the importer 'otherwise mixes them with the general property of the state by breaking up his packages, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common [fol. 77] mass, and the law may treat them as it finds them.' . . ." [Tr. of Rec. pp. 48-49.]

The District Court rejected the contention of the lumber company that each board constituted an "original package." Such idea and such terminology do seem strange. In the District Court opinion, we read:

"The circumstances attending the shipments in question are additional reasons for concluding that the

> several boards or timbers were not original packages. (1) Lumber is universally bought and sold by board feet; (2) The United States Customs' method of classification of lumber is by board feet; (3) the price paid by respondent for its shipments is determined by board feet except in the purchase of lignum vitae logs; (4) the consular certificates of origin describe the shipments by board feet, grade and variety; (5) the absence of an address from each board and the manner of transporting the lumber as an aggregation of goods,—these facts establish the folly of calling each plank an original package, and of designating the segregated and classified lumber in the bins to be in the 'original form' in which it was shipped." [Tr. of Rec. p. 48.]

The requirement, in the phrase of Chief Justice Marshall, is that the imported property be still "in the original form or package." That involves two features, (1) the package or container, and, more important (2) the contents. Not only must the property be the same package, *i. e.*, be the same in form or shape—it likewise must be all of the property, *i. e.*, the same property in quantity.

The want of jurisdiction in the States over imports in the original form or package and exclusive jurisdiction in the federal government covers, it seems, only an entire import, *i. e.*, in the phrase of Chief Justice Marshall, an import "in the original form or package." The "original form or package" means the property assembled or collected as a unit to be brought into the country. Such property so brought in, only so long as still an entity or unit, will continue beyond the jurisdiction of the state. The complete aggregation of component articles which together enter the country, while they continue to be such aggrega-

tion and while they are still in the "original form or package," are not subject to local taxation. The idea behind the term "original package" is a collection of articles. *The "original package" is the aggregate of the articles constituting the property imported. The reason for packaging, or wrapping, or binding together is to unite or unify the separate articles, as a single import.* Fastening together in a bundle by enclosing container or wrapping or cord is necessary in most cases so as to hold the articles together and to keep them from scattering.

Occasionally, the articles, by reason of their very nature, need no fastening together and are not fastened together or enclosed in any wrapping or container. If unlike the ordinary situation, they are not small in size or light in weight, they will not scatter or become separated. If the articles are large, like iron beams, *or lumber,* it is not necessary to wrap them or fasten articles, the aggregate shipment is the import and this, even though the containing receptacle is inadequate or not fastened or is uncovered.

> "An original package as applied to interstate and international commerce, is a package, bundle, or *aggregation of goods, put up in whatever form,* covering, a receptacle for transportation *and as a unit transported* from one state or nation to another. It is the identical package delivered by the consignor to the carrier at the initial point of shipment, in the exact condition in which it was shipped. . . . Where bottles or packages are fastened together and marked, or are placed in a larger box, barrel, crate, or other receptacle, and shipped therein, the outside box, bundle, or receptacle, and not any bottle or package contained therein, constitutes the original package and this is true, although each bottle or package is

> separately wrapped in paper labeled 'original package' and marked with the name of the importer, and although the larger receptacle is furnished by the carrier." (15 Corpus Juris Secundum, 310.)

It is not reasonable to conclude that as to a bulk shipment, for example, of fish or coal, that each individual fish or piece of coal is the original "import" in the original form or package.

After sorting and segregation by size and grade, and sales of portions of the bulk shipment received, and commingling of the remaining portions from such shipment with unsold remnants remaining from prior shipments received from the same producer, each piece of coal is not and cannot be the original "import" in the original form or package.

We respectfully submit that in ordinary business practice, whether the product involved is lumber, handled and sold in bulk by the "thousands of board feet", or coal, handled and sold in bulk by the "ton", the unit of import in such bulk import is, in fact, and in law, the shipment, that is, the aggregation of goods as a unit transported, and not a piece of coal or a piece of lumber.

The fallacy of petitioner's contention is further indicated by the fact that if every stick or piece of lumber were an original package, each customer on a sale would be buying one or more original packages and it would be, if not impossible, at least against all custom and business practice ever to reduce the merchandise from such purported original package when it went into commercial circulation. To argue, therefore, that in order to take the merchandise from its original packaged condition one

would have to cut or break up each piece or stick shipped in, is manifestly absurd.

The District Court considers the situations presented by the cases:

> "While no reported case involves the classification of a cargo of lumber, some light may be shed upon it by the adjudication as the original package of sealed cases of beer (Leisy v. Hardin, 135 U. S. 100); casks containing a [fol. 73] dozen bottles of tonic (Extract & Tonic Co. v. Lynch, 226 U. S. 192); crates containing 20 pails each of lard (State v. Armour & Co., 240 U. S. 410); packages containing two or more five gallon cans of gasoline (Askren v. Continental Oil Co., 252 U. S. 444); packages containing three or more barrels and crates enclosing bottles of liquor (Gluckenheimer v. Sellers, 81 Fed. 997). An open box holding bottles of liquor is an original package in interstate commerce. (Collins v. Hills, 77 Iowa 181.) In an action to enjoin a newsdealer from selling a certain publication prohibited from sale it was held that when the newspapers were received by the defendant in bulk or in bundle and placed on the newstand for sale they became commingled with the mass of property in the state. (State *Ex rel* Black v. Deloye, 68 So. 993, 995.) Even though a large receptacle is uncovered, leaving exposed the individual articles such as bales, cartons, crates and cases of dry goods which constitute the shipment, still such receptacle is the original package in contemplation of the constitutional restraint upon local taxation of an import. (11 Am. Jur., p. 55, sec. 60.) The fact that one article in a cargo could be shipped alone does not for that reason render each item in such a shipment a separate, original package. (*In re* Harmon, 43 Fed. 372.) . . ." [Tr. of Rec. p. 47.]

It is not important whether the component elements of the unit importation are boxes or cans, or pails, or bottles, or envelopes; or whether, as here, they are logs and pieces of lumber. It is not important whether the component elements of the unit import are held together by box or basket, or case, or bundled by rope or cord, or whether, as here, merely piled or stacked together. In any such situation the component elements together constitute the import. In the one case a container or wrapping is necessary to prevent their scattering and to indicate the fact of such unit import; in the other case it is not necessary—weight and size and stacking or piling the component elements similarly and adequately indicate the fact of such unit import. The fact of a unit is the important thing—not the method by which indicated. The principle declared equally applies, that the import "in the original form or package," *i. e.*, the unit importation, is the thing which is within the exclusive federal jurisdiction and which may not be taxed by the states. When that original unit is broken, and the property is no longer "in the original form or package," but is, instead, a mere part of the importation, and a fortiori when collected and commingled with the remnants and unsold portions of other imports, the property is no longer the import or "in the original form or package," and is no longer outside the state's jurisdiction to tax. The declaration and decision of the District Court seems entirely sound and in line with the decisions of this Court. *Hooven and Allison Co. v. Evatt,* 324 U. S. 652, 89 L. Ed. 1252, indicates no different conclusion. That decision places imports for manufacture in the same category as imports for sale. The Court there said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and

> lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported . . . or when the original packages in which they were imported are broken . . . but no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation . . ." (p. 1264).

The case did not involve question of the assessment of a remaining portion of an import after depletion by use of portions in a manufacturing process. The dissenting opinion of Mr. Justice Murphy interprets the majority opinion as granting tax immunity to only the undiminished import in storage in the owner's warehouse. As he says:

> "With Mr. Justice Black's view that whatever constitutional tax immunity the merchandise in question may have had was lost by virtue of its storage in petitioner's warehouse pending its use in petitioner's manufacturing operations, I agree. But the Court holds otherwise on that issue" (p. 1278).

Mr. Justice Black interpreted the majority opinion as turning upon the breaking of the imported package for purpose of manufacturing and not as involving or applying to a possible unused portion of an import.

> "Are these fibers to be taxed when the 'reed' which covers them is removed or must the state wait until it can prove that one of the steel bands has been broken? . . . The states are entitled to have a definite answer to these practical questions" (p. 1278).

The opinion was also so interpreted by the annotator thereof in the Lawyer's Edition report. It recites that the decision

> "held that materials imported by a manufacturer, while stored in the original packages in a warehouse at the factory pending their use, retain the character of imports entitled to constitutional immunity from state taxation, but that such immunity ceases when they are subjected to the manufacture for which they were imported or when the original packages in which they were imported are broken."

Yet the petition herein states petitioner's contrary idea, to wit, that in *Hooven and Allison Co. v. Evatt* "unquestionably these were depleted remnants of former total shipments." (Pet. p. 13.) The sentence immediately preceding such conclusion is inconsistent therewith, and the petition says:

> "The fibers were utilized from time to time in manufacturing and the Ohio State ad valorem tax was laid upon said bales of hemp and other fibers stored in the original packages in which imported" (*ib.* p. 13).

In support of its contention that lumber is dealt with in the individual parcel or piece and that the log, plank or board is the unit of package in the industry, appellant cites (Pet. and Br. p. 23), 63 Corpus Juris, page 308, which is the beginning of the article on trademarks and trade names, California Penal Code Sections 356 and 537e, which relate to the defacing of marks of ownership on certain materials; and the case of *Burke v. Cassin,* 45 Cal. 467, a decision relating to the pirating of a trademark, in which not one single mention is made of lumber or boards in any shape or condition whatever. We think it unnecessary to make any extended argument that such authorities are in no wise applicable to the problem before this Court.

III.

No Debatable Constitutional Question Is Involved.

In view of the previous decisions of this Honorable Court upon the subject no debatable constitutional question is presented. The facts bring this case squarely within the rule of *State v. Armour and Company,* 240 U. S. 510; *Purity Extract and T Company v. Lynch,* 226 U. S. 192; *Austin v. Tennessee,* 179 U. S. 343, and *May v. New Orleans,* 178 U. S. 496.

Conclusion.

In a case involving the taxability of imported property, the question raised may be one or more of the three following, to wit:

(1) Was the property imported from a foreign country?

(2) Was the property still in its original form or package?

(3) Was the property still in the hands of the original importer?

In the present case the issue is on the second question alone, viz., whether plaintiff's taxed lumber was yet in the original form or package. (There is no issue on (1) that the lumber entered the country as an import, or on (3) that the lumber was still in the hands of the original importer.)

The imported lumber lost its original exempt status and became taxable by reason of its incorporation into the mass of property in the country. Such incorporation resulted from the importer's treatment of it in at least two particulars. First, by processing which preserved and conditioned

it and rendered it more valuable and more saleable; second, by sale of portions of the lumber and commingling together the balance according to thickness, kind, quality, grade and color. By reason of these acts of plaintiff the lumber became taxable as a part of the mass of property in the country.

The lumber imported by plaintiff from foreign countries was by plaintiff *after arrival in this state* subjected to certain processes to render it marketable in its business and thus more saleable and more valuable. The lumber arrived in this country on vessels. It was transported and was unloaded in compact, intact shipments. Upon being unloaded at the docks in Los Angeles it was tallied by plaintiff's employees and sorted and segregated in four ways: (1) by sorting out the split and otherwise damaged lumber; (2) by sorting it as to the various thicknesses; (3) by sorting it as to grades; and (4) by sorting the Philippine mahogany according to color. Then the lumber, as so sorted, was segregated by thickness and by grade, was piled in bins in the plaintiff's lumber yard and place of business and offered for sale by plaintiff in its retail and wholesale lumber business.

We submit that the plaintiff's lumber herein taxed was no longer an original import, nor as such removed from the jurisdiction of the County and City to tax; instead, that plaintiff's operations with regard to and handling of lumber after arrival in this country, consisting of tallying and sorting and arranging it for preservation and conditioning and in preparing and readying it for sale, had the effect of incorporating and mixing it up with the mass of taxable property in the county.

Further, it would seem clear that the sale and withdrawal and delivery to purchasers at wholesale and at retail of portions of the shipments and collecting and commingling for sale of the remnants and remaining portions left from different shipments must have had the effect of incorporating the same into the mass of taxable property in the country and of dissipating the tax immunity theretofore clothing each shipment so long as it remained entire and intact as an original import in the hands of the original importer.

Respectfully submitted,

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